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No. 95-2012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARGARET B. FENT AND JERRY R. FENT,
wife and husband,

Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, OKLAHOMA CORPORATION COMMISSION AND STATE OF OKLAHOMA,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Supreme Court

JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Oklahoma Court of Appeals Division 2 correctly held, under Oklahoma law, that an order of the Oklahoma Corporation Commission establishing rates and charges for telephone service was not voidable in its entirety on account of alleged constitutional deficiencies in an "unconnected and independent" seven-word provision addressing ownership rights in telephone wiring inside Oklahoma homes and businesses.

RULE 29.6 STATEMENT

Respondent Southwestern Bell Telephone Company is a wholly-owned subsidiary of SBC Communications, Inc. SBC Communications, Inc. has no subsidiaries with securities in the hands of the public.

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Petitioners seek to beguile this Court into reviewing a decade-old ratemaking order of the Oklahoma Corporation Commission ("OCC" or "Commission"), ostensibly on account of violations of the Due Process and Takings Clauses of the federal Constitution. The novel claim presented is that OCC orders *granting* Margaret and Jerry Fent certain limited rights in the telephone wiring inside their home somehow *deprived* them of property within the meaning of the Due Process Clause or *took* property in violation of the Takings Clause. These claims were rejected below on numerous state-law grounds by both the OCC (to which the Fents' claims were first presented)

and a reviewing state court, with the Oklahoma Supreme Court declining review altogether. Review by this Court is clearly unwarranted.

JURISDICTION

Petitioners invoke 28 U.S.C. § 1257(a) as the basis for this Court's jurisdiction to review the decision of the Oklahoma Court of Appeals. As explained below, there is a substantial issue as to whether jurisdiction is available under § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the constitutional provisions and statutes identified in the petition, Okla. Stat tit. 75 § 11a is also relevant. In pertinent part, it provides:

§ 11a. Construction of statutes—Severability. In the construction of the statutes of this state, the following rules shall be observed: ....

(2) For acts enacted prior to July 1, 1989, whether or not such acts were enacted with an express provision for severability, it is the intent of the Oklahoma Legislature that the act or any portion of the act or application of the act shall be severable unless:

(a) the construction of the provisions or application of the act would be inconsistent with the manifest intent of the Legislature;

(b) the court finds the valid provisions of the act are so essentially and inseparably connected with and so dependent upon the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or

(c) the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

COUNTERSTATEMENT OF THE CASE

On January 26, 1994, Jerry Fent, an Oklahoma City lawyer and self-styled consumer advocate, filed an application on behalf of himself and his wife asking the Oklahoma Corporation Commission to "void" OCC order No. 292337, 74 PUR 4th 624 (Jan. 1986) (the "Ratemaking Order").

The Ratemaking Order had issued long before—on January 29, 1986—and had been reviewed by the Oklahoma Supreme Court in *Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309 (Okla. 1989). The Ratemaking Order approved rate increases for Southwestern Bell Telephone Company ("SWBT"), the regulated provider of telephone service to the Oklahoma City area, that, according to the OCC, produced a significant "annual increase in SWBT's intrastate earnings." *In re Application of Margaret and Jerry Fent*, OCC Order No. 388589 (Dec. 9, 1994) ("Commission Decision"), Petition at C-3.

In accordance with a federal deregulatory initiative then under way at the Federal Communications Commission, the Ratemaking Order also, as a subsidiary matter, authorized SWBT to take preliminary steps toward offering customers "optional" inside-wire maintenance service. *Id.* Because of this offering, customers were able for the first time to choose between purchasing inside-wire maintenance from SWBT (at prices set in the marketplace); purchasing such service from third parties; or maintaining the wiring inside their homes and businesses themselves. Maintenance of customer wiring had previously been the exclusive responsibility of SWBT, the owner of the wiring.

The Fents' application sought vacatur of the OCC Ratemaking Order in its entirety because of alleged violations of the Oklahoma and federal constitutions. The only federal claim squarely presented was the contention that the order violated due process by transferring ownership of the wiring in the Fents' home from Southwestern Bell to the Fents without prior notice by "personal service." *Application of Margaret*

and Jerry Fent, OCC Cause No. PUD 94-292 at 7 (filed Jan. 26, 1994) ("Fent Application"). In addition, the Fents also raised takings claims, but cited for support only the Takings Clause of the Oklahoma Constitution. *See* Okla. Const. art. II § 23; *see also, e.g.*, Fent Application at 10, 12, 14. According to the Fents, the lack of a "'separability clause' or 'saving clause'" in the Ratemaking Order rendered it "totally void" on account of these purported deficiencies. *Id.* at 9.

A. Rejection of the Fents' Claims by the Oklahoma Corporation Commission

The Oklahoma Corporation Commission rejected all of the Fents' claims on three separate state-law grounds. *First*, the Commission found that the Fents' claims were time-barred under Oklahoma law. According to the Commission, the order "of which Applicants complain" became "final and unappealable thirty days after January 29, 1986;" hence, granting vacatur was "beyond the agency's power." Commission Decision, Petition at C-6 (*citing Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309, 1318 (Okla. 1989)).

Second, the Commission found that the Fents lacked standing to bring their claims before the Commission because they had not "in fact suffered injury." Commission Decision, Petition at C-10 (*citing Independent School Dist. No. 9 v. Glass*, 639 P.2d 1233, 1237 (Okla. 1982)). The Commission noted in this connection that the Fents "never pled nor asserted that they have had or are having any problems with the wiring." *Id.* at C-9 - C-10.

Third, the Commission also found, contrary to the premise of the Fents' due process and takings claims, that the "simple inside wiring on its subscribers' premises ... has remained the property" of SWBT. Commission Decision, Petition at C-9. Here the Commission discussed the FCC's role in determining who owned inside wiring after deregulation of wire-maintenance service. It concluded that, while positions taken by the FCC in a rulemaking addressing wiring ownership had evolved, the FCC had clearly settled on recognizing the

retention of ownership by telephone companies. *Id.* at C-8. The OCC found its own policy "consistent with the FCC's policy" resulting from this rulemaking. *Id.*

In essence, the OCC found that the language in the Ratemaking Order cited by the Fents as transferring title to the wiring in their home was, at best, an interim position. On January 29, 1986, when the Ratemaking Order issued, an FCC rulemaking *proposal* indeed called for transferring wiring ownership from telephone companies to private persons, and the OCC's Ratemaking Order partly reflected this pending proposal.[1] But the very next month, the FCC's final rule changed course by calling for abandonment of the companies' claims to inside wiring without specifying who (if anyone) would come to own it.[2] And even more important, upon reconsideration in November 1986, the FCC ultimately settled on retention of telephone-company ownership, along with regulatory oversight to ensure that companies did not misuse their property rights to stifle competition for provision of wiring installation and maintenance.[3]

Accordingly, it was the FCC's *final* policy—which recognized retention of title by telephone companies—that the

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[1] *See Second Report and Order, In the Matter of Detariffing the Installation and Maintenance of Inside Wiring* at 4, CC Docket 79-105 (Feb. 24, 1986) (noting that the FCC had proposed that "the ownership/title to inside wiring *should pass* to the customer and/or owner of the premises") (emphasis added).

[2] *Id.* at 24 (requiring that companies abandon claims to wiring, while leaving the question of *to whom* ownership should pass to be "resolved through the application of local property law").

[3] Commission Decision, Petition at C-8 (describing the FCC's *Memorandum Opinion and Order on Reconsideration, In the Matter of Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105 (Nov. 21, 1986), as "revers[ing] its previous requirement that telephone companies relinquish ownership of inside wiring and instead order[ing] that [they] simply be precluded from using ownership as a basis for denying a customer the opportunity to choose" their provider of inside wiring installation and maintenance).

OCC ultimately followed. Hence, as the Commission Decision noted, the OCC conspicuously left in place a longstanding provision of SWBT's "General Exchange Tariff" (the company-specific, OCC document defining SWBT's relationship with its customers) stating that "[e]quipment, and lines on customers' premises, furnished by the telephone company, shall be and remain the property of the Telephone Company...." *See* Rules and Regulations Applying to All Customers' Contracts, Tab 28, Section 7.2C; *see also* Commission Decision, Petition at C-9 (relying on this provision); *cf. Teleco, Inc. v. Southwestern Bell Tel. Co.*, 511 F.2d 949, 952 (10th Cir. 1975) (Oklahoma regulatory tariffs carry force of law).

Based on this critical finding that "ownership of inside wiring has never transferred from the telephone company," the OCC rejected out of hand the Fents' due process and takings claims. Commission Decision, Petition at C-8. It noted simply that it found "no merit" in the Fents' claims that they had been "deprived of life, liberty or property" and that the Fents' had "not identified ... what property ... if any was taken." *Id.* at C-9. The OCC thereupon dismissed the Fents' application with prejudice. *Id* at C-10.

B. Rejection of the Fents' Claims on Judicial Review

Although the Fents initially sought review in the Oklahoma Supreme Court, *see* Okla. Const art. IX § 20, that court declined to hear the case, but instead transferred it to Oklahoma Court of Appeals Division No. 2. On October 17, 1995, a unanimous three-judge panel of the appellate court affirmed the OCC's dismissal of the Fent application.

Speaking for the court, Judge Boudreau reasoned that "the portion of the [Ratemaking Order] determining permanent rates stands unconnected and independent of the seven words in the order that allegedly transferred title [to] SWB's 'inside wiring.'" *Fent v. Southwestern Bell Tel. Co. et al.*, No. 84,815, mem. op. (Okla. Ct. App. Oct. 17, 1995) ("Appellate Decision"), Petition at A-6. Thus, the Court concluded that

"even if the alleged offending portion was constitutionally infirm," the "remainder of the order" would be "severable" and a "viable" enactment. Appellate Decision, Petition at A-7. On the basis of this appellate court opinion, the Oklahoma Supreme Court denied certiorari to consider the claims now presented to this Court. *Fent v. Southwestern Bell Tel. Co. et al.*, No. 84,815, mem. op. (Okla. Mar. 20, 1996), Petition at B-1.

REASONS FOR DENYING THE WRIT

As elaborated below, the reasons the Court should not grant the petition are both numerous and manifest.

First, the appellate court's state-law severability analysis provides an "adequate and independent" state-law ground of decision, foreclosing this Court's jurisdiction. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (granting review where "the same judgment would be rendered by the state court after [this Court had] corrected its view of federal laws" would constitute an improper "advisory opinion") (internal citation and quotation marks omitted). In making its severability finding, the appellate court relied on Okla. Stat. tit. 75 § 11a (1991) and the Oklahoma Supreme Court's application of that statute in *Ethics Comm'n v. Cullison*, 850 P.2d 1069, 1077 (Okla. 1993). *See* Appellate Decision, Petition at A-5. Because the Fents' claims would be barred by these state-law authorities regardless of how this Court might rule on the constitutional issues raised in the petition, this Court lacks jurisdiction to grant review.

Second, the appellate court's state-law severability analysis is not merely an "adequate and independent" state ground supporting the decision; it is the sole ground of decision. Because the Oklahoma Court of Appeals found it "unnecessary to address" the Fents' allegation that the Ratemaking Order "was void on ... constitutional grounds," *see* Appellate Decision, Petition at A-7, it never even passed on the Fents' federal claims. This fact, standing alone, is also sufficient reason to decline review. *See, e.g., Rodgers v.*

Lodge, 458 U.S. 613, 628 n.10 (1982) (holding that because challenge had not been "addressed" by the lower court the Supreme Court also would "not address it").

Third, even if this Court had jurisdiction to grant review there would be no warrant for exercising it. The Fents do not claim that the OCC and Oklahoma appellate court decisions create a split with other courts that have addressed similar claims. Indeed, far from pointing to a conflict between courts calling for resolution, the Fents concede that Oklahoma's decade-old inside-wire ownership regime has been duplicated, presumably without judicial objection, in "[v]irtually every State." Petition at 17. Until at least one state or federal court breaks this impressive unanimity, *see* Petition at 17-19, there is no need for this Court's involvement.

Fourth, the Fents' claims are obviously meritless. The only constitutional challenge squarely raised below is the claim that the Commission deprived the Fents of procedural due process by transferring property rights *to* them without prior notice by personal service. But the Fents' premise—that States may not make generally applicable legislation affecting property rights absent prior personal notice to those affected—is wrong even where persons are *deprived* of property. *See Texaco, Inc. v. Short*, 454 U.S. 516, 537 (1982) (Where State "has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner" the Due Process Clause does not require prior personal notice.) It follows *a fortiori* that no prior personal notice is required where, as here, no deprivation of any property interest has occurred.

Similarly, the Fents' oblique federal Takings claim is also frivolous. Not only was it not presented or passed on below, *see supra* at 3-4; *Rodgers v. Lodge*, 458 U.S. at 628 n.10, but also the FCC and OCC wiring orders, far from *taking* the Fents' property rights, actually augmented them. As the Commission noted, the Fents "never pled nor asserted that they

have had or are having any problems with the wiring." *Id.* at C-9 - C-10. The Fents thus never explained how their augmented control over Southwestern Bell's valuable and useful property could ever constitute a federal "taking."

Moreover, the Fents' takings claims are also asserted against the wrong sovereign. As noted above, it was the FCC—not the OCC—that drove the deregulation of inside wiring. *Cf. City of New York v. Federal Communications Comm'n*, 486 U.S. 57 (1988) (FCC may preempt State and local regulation in conflict with FCC policy). Under these circumstances, claims for compensation arising from inside-wiring deregulation may be brought only against the federal government, in federal court, under the Tucker Act. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

Fifth, even if the appellate court had not disposed of the case on severability grounds, it would still have had to face the two other "adequate and independent" state jurisdictional grounds relied on by the OCC—the 30-day time bar and the Fents' lack of standing before the Commission. *See* Commission Decision, Petition at C-6, C-10. These Commission findings, like the appellate court's severability finding, rested exclusively on provisions of Oklahoma law (*federal* standing requirements obviously do not apply to the Commission), as authoritatively interpreted by the Oklahoma Supreme Court. *See* Commission Decision, Petition at C-6 (finding the Fents' claims time-barred under *Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309, 1318 (Okla. 1989)); *id.* at C-10 (finding that the Fents lack standing under *Independent School Dist. No. 9 v. Glass*, 639 P.2d 1233, 1237 (Okla. 1982)). These findings are therefore two more bars to this Court's jurisdiction.

Sixth, even if the Fents could surmount all of the collateral obstacles to this Court's jurisdiction—severability, standing, the 30-day time-bar—such jurisdiction would still fail because of a predicate state-law finding on an essential element of the Fents' claims. In dismissing the Fents' constitutional

claims on the merits, the OCC expressly rejected those claims' critical premise—that the OCC's Ratemaking Order transferred an ownership interest in the Fents' inside telephone wiring. *See* Commission Decision, Petition at C-8. But the OCC's rejection of the transfer-of-ownership premise was not disturbed by the appellate court, and the Fents have not explained how this Court may set aside an authoritative OCC interpretation of *its own* order. That finding is therefore yet another adequate and independent state ground barring review.

Finally, the Oklahoma Supreme Court twice refused to address the very claims now brought to this Court. Because granting certiorari "represents a commitment of scarce judicial resources," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985), only on the rarest of occasions has this Court been willing to expend "scarce resources" where a state court of last resort has declined to do so. *See, e.g., Norfolk & Western Ry. v. Hiles*, 116 S.Ct. 890 (1996) (certiorari to the Appellate Court of Illinois, 5th Judicial District). This clearly is not such an occasion.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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